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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,
Petitioners,
v.
HONISS W. CANE, JR., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents alleged that Petitioner Worcester County, Maryland's at-large system of electing its governing body violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, which prohibits laws that "result[]" in dilution of minority voting strength. The courts below held that Respondents had shown, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a compact single-member district with a black voting age population majority could be drawn, although the district Respondents proposed stretched the length of the County and disregarded traditional districting principles of compactness and respect for city boundaries. Despite Respondents' admission that this district was intentionally drawn on racial lines, the courts below rejected Petitioners' argument that it violated *Shaw v. Reno*, 113 S. Ct. 2816 (1993), which prohibits such intentional segregation of voters unless the resulting district is narrowly tailored to serve a compelling governmental interest. The courts below also held that, based on the "totality of circumstances," blacks had less opportunity than whites to participate in the political process and elect representatives of their choice, in violation of § 2. This holding was based solely on conclusory statements regarding past racial discrimination unrelated to any present inequality of opportunity for blacks to participate in the political process and an absence of black electoral success proportionate to the percentage of voting age blacks in the County's population. The questions presented are:

(1) Whether the courts below erred in holding that a racially gerrymandered majority-minority district satisfied *Gingles*' "geographical compactness" requirement, when that district violated *Shaw*'s prohibition against intentional racial segregation of voters absent a compelling governmental interest and narrow tailoring.

(2) Whether the courts below erred in holding that, based on the "totality of circumstances," Respondents had proved a § 2 violation.

PARTIES

The parties to this proceeding in the courts below were as follows: Worcester County, Maryland; George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as Members of the Worcester County Board of Commissioners; George H. Dryden, Hinson Finney, and Mark Frostrom, as Members of the Worcester County Board of Election Supervisors; Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, and William Waters, Worcester County Voting Rights Coalition and Worcester County Branch, NAACP; Washington Legal Foundation (*amicus curiae*); Center For Voting And Democracy (*amicus curiae*); and United States of America (*amicus curiae*).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. The Complaint	2
B. The Trial	3
C. The District Court's Liability Opinion	4
D. The District Court's Remedy Opinion	6
E. The Fourth Circuit's Opinion	6
REASONS FOR GRANTING THE WRIT	8
I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISIONS IN *SHAW* AND *GINGLES*, AS WELL AS WITH DECISIONS OF OTHER LOWER COURTS	8
A. The Decisions By The Courts Below Regarding Direct Evidence Of Racial Gerrymandering Conflict With This Court's Decision In *Shaw*	8
B. The Decisions By The Courts Below Regarding Bizarrely-Shaped Districts Conflict With This Court's Decision In *Shaw* And Its Progeny	10

TABLE OF CONTENTS—Continued

	Page
C. The Decisions By The Courts Below Conflict With This Court's Decision In *Gingles*..	12
D. The Justifications Proffered By The Courts Below For The Bizarre Shape Of Respondents' Proposed District Contravene The Requirements Of *Shaw* And *Voinovich v. Quilter*	13
E. The Decisions Of The Courts Below Conflict With Those Of Other Courts Regarding The Propriety Of Racially Defined "Communities Of Interest"	15
II. THE DECISIONS BELOW PRESENT AN ISSUE OF OVERRIDING NATIONAL IMPORTANCE	17
III. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *DEGRANDY* AND THE FIFTH CIRCUIT'S DECISION IN *WESTWEGO*	18
CONCLUSION	21

APPENDICES

APPENDIX A	Fourth Circuit Opinion	1a
APPENDIX B	District Court Opinion on Liability	17a
APPENDIX C	District Court Opinion on Remedy..	33a
APPENDIX D	District Court Order on Liability..	43a
APPENDIX E	District Court Order on Remedy....	44a
APPENDIX F	Fourth Circuit Denial of Rehearing	45a
APPENDIX G	Fourth Circuit Mandate	47a
APPENDIX H	Transcript Excerpts	48a
APPENDIX I	Bill 93-6	49a
APPENDIX J	Copy of 42 U.S.C. § 1973	64a

TABLE OF AUTHORITIES

Cases: Page

Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992), *vacated on other grounds sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 113 S. Ct. 2954 (1993) 15
Cane v. Worcester County, Maryland, 840 F. Supp. 1081 (D. Md. 1994), and 847 F. Supp. 369 (D. Md. 1994), *aff'd in part, rev'd in part and remanded*, 35 F.3d 921 (4th Cir. 1994) 1
Chisom v. Roemer, 501 U.S. 380 (1991) 19
Clark v. Calhoun County, Mississippi, 21 F.3d 92 (5th Cir. 1994) 14, 20
Growe v. Emison, 113 S. Ct. 1075 (1993) 13
Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded*, 62 U.S.L.W. 3859, No. 93-5194, *further proceedings on remand*, C.A. No. 92-1522 (W.D. La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *appeal pending*, No. 94-627, United States Supreme Court 10, 11, 12, 21
Holder v. Hall, 114 S. Ct. 2581 (1994) 18
Jeffers v. Tucker, 847 F. Supp. 655 (E.D. Ark. 1994) 11, 12
Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) 18, 19, 20
Johnson v. Miller, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994) (per curiam), *appeal pending*, Nos. 94-631 and 94-797, United States Supreme Court 11, 12, 15, 16, 21
League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994) 19
Ortiz v. City of Philadelphia, 28 F.3d 306 (3d Cir. 1994) 19
Shaw v. Reno, 113 S. Ct. 2816 (1993), *on remand sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *appeal pending*, No. 94-923, United States Supreme Court ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Thornburg v. Gingles, 478 U.S. 30 (1986) .....*passim*
Vera v. Richards, No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (S.D. Tex. Aug. 17, 1994), *stay granted*, 1994 U.S. Dist. LEXIS 12334 (1994), *appeal pending*, Nos. 94-805 and 94-806, United States Supreme Court 11, 12, 16, 21
Voinovich v. Quilter, 113 S. Ct. 1149 (1993)..... 13
Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989), *rev'd after remand*, 906 F.2d 1042 (5th Cir. 1990), *rev'd and remanded*, 946 F.2d 1109 (5th Cir. 1991) 20
Wright v. Rockefeller, 376 U.S. 52 (1964) 15

Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343(3) 2
42 U.S.C. § 1973 .....*passim*
42 U.S.C. § 1983 2

Miscellaneous:

U.S. Bureau of the Census, *1992 Census of Governments*, Vol. 1, Government Organization, No. 1 (March 1994) 18
Worcester County Board of Commissioners Bill 93-6 .....*passim*

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OPINIONS BELOW

The Fourth Circuit's Opinion is reported at *Cane v. Worcester County, Maryland*, 35 F.3d 921 (4th Cir. 1994), and is reproduced at App. 1a-16a, and the Fourth Circuit's denial of rehearing and rehearing in banc is reproduced at App. 45a-46a; the District Court's opinions are reported at *Cane v. Worcester County, Maryland*, 840 F. Supp. 1081 (D. Md. 1994), and 847 F. Supp. 369 (D. Md. 1994), and are reproduced at App. 17a-32a and App. 33a-42a, respectively.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was rendered on September 16, 1994. Petitioners filed a Petition for Rehearing and Suggestion for Rehearing In Banc on September 30, 1994, which was denied on Octo-

ber 12, 1994. This Petition for a Writ of Certiorari has been brought within ninety (90) days of said denial, as required by Supreme Court Rule 13.1. Review is sought pursuant to 28 U.S.C. § 1254(1). This is not a Cross-Petition and Petitioners know of no party who intends to file such a Petition; thus, the provisions of Supreme Court Rule 12.3 do not presently apply.

STATUTORY PROVISION INVOLVED

This appeal involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The text of this statute is set forth at App. 64a.

STATEMENT OF THE CASE

A. The Complaint

Respondents, African-American residents and minority organizations in Worcester County, Maryland, challenged the at-large method of electing members of the County Board of Commissioners under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.* At the time this action was filed on November 16, 1992, the Board's five members were all elected at-large. Four of the members were required to reside in specified "residency districts." The fifth Board member was not required to reside in any particular district.

In May 1993, approximately six months before trial, in response to population changes reflected in the 1990 Census, the Board enacted Bill 93-6, which maintained the at-large electoral system and created a fifth residency district. Under this Bill, each Board member must reside in a separate residency district. The legislative findings accompanying Bill 93-6 reflect the Board's determination that a fifth population center had developed and that this change in demographic patterns warranted the crea-

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*** The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and 42 U.S.C. §§ 1973, 1983.**

tion of the fifth residency district. App. 3a. Thus, at the time of trial, the electoral system in effect was Bill 93-6, and not the system Respondents had challenged in their complaint.

B. The Trial

At trial, Respondents offered two alternative single-member districting plans that they had devised, each of which created a district with an African-American voting age population ("VAP") majority.[1] Respondents' expert who created this district admitted that he purposefully segregated citizens into separate voting districts on the basis of race:

> Q Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed majority-minority district], would it be fair to say that what you have done is, you have linked together the black population concentrations in these three noncontiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> A [By Mr. Cooper] Well, obviously, that's what we've done.

App. 48a.

By segregating black citizens into a separate district, Respondents created a district in which they would have over 60% of the voting age population. In doing so, however, Respondents ignored non-racial communities of interest. They instead justified their intentional use of race by claiming through their experts that "[i]f you drew districts recognizing that [racial] difference, you would just be recognizing what already exists." App. 48a.

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[1] One of Respondents' proposed plans had a 60% black VAP, and the other had a 65.1% black VAP. Although these two plans had majority-minority districts with different VAPs, the districts were substantially identical, and for ease of reference, the districts will be referred to as Respondents' proposed district.

This proposed majority-minority district disregarded traditional districting principles and legislative policy preferences reflected in the legislative history of Bill 93-6. App. 51a-57a. These choices included the policies of having each Commissioner represent the entire County population, thereby maintaining the direct accountability of each Commissioner to all voters, avoiding division of the municipalities in the County, and preserving communities of interest, as defined by common social, political, and economic interests.

C. The District Court's Liability Opinion

Following a three-day trial, on January 7, 1994, the District Court concluded that the at-large electoral system in existence prior to enactment of Bill 93-6 violated § 2. The District Court applied the three preconditions for § 2 liability established in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

> [F]or a successful § 2 challenge, the plaintiffs must prove three preconditions: 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group is politically cohesive; and 3) the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51.

App. 20a-21a. The District Court held that Respondents had satisfied all three preconditions. In particular, relying on the proposed plan submitted by Respondents, the District Court concluded that the minority community was sufficiently large and geographically compact to create a district with an African-American VAP majority (the first *Gingles* precondition). As the Court explained:

> While the plan does entail running the newly created districts across other voting district lines and through towns, this is unavoidable because of the heavy white population and the need to achieve a majority African-American population in one of the districts.

> The districts [proposed by Respondents] may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors" nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering. They are in line with the configurations of electoral districts that have been approved in other cases.

App. 22a.[2]

The District Court went on to state that it considered the "Totality of the Circumstances," App. 31a, in finding that the electoral system violated § 2, but commented only about discrimination occurring from the 1800s until the 1960s. Indeed, the District Court's analysis of this "totality" was limited to two paragraphs:

> Maryland and its political subdivisions bear a history of official racial discrimination against African-Americans. The Maryland Constitution of 1867 limited the right to vote to white males. Until 1864, slavery was authorized by the state constitution. Until the Fifteenth Amendment to the United States Constitution was ratified in 1870, African-Americans were denied the right to vote under the state constitution. Maryland failed to ratify this Amendment.
>
> Legal segregation affected African-Americans in many aspects of daily life in the early 1900s. During this period, laws which made property ownership a prerequisite to voting were enacted in the County. The judicially noticed facts also show a history of official resistance to desegregation in Worcester County. It did not fully desegregate its schools after

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[2] The District Court also held that Respondents had satisfied the second and third *Gingles* preconditions by proving that the minority community was politically cohesive and that white bloc voting was legally significant. In making the latter determination, the Court noted that "no African-American has won a county office in a county-wide head-to-head contest against a white candidate" and that the residency district requirement aggravated "the political disadvantage of the County's minorities." App. 30a.

> the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954).

App. 31a. The District Court's analysis of the "totality of circumstances" did not include any evaluation of the current impact or detrimental effect of such past history upon minority access to, and participation in, the political process. Based on this review of the "totality of circumstances," the District Court concluded that the election of five County Board members at-large, four of them from residency districts, violated § 2 of the Voting Rights Act. App. 31a. The District Court, however, did not consider whether Bill 93-6 violated § 2. As the Fourth Circuit stated, "the district court failed to rule on the legality of . . . Bill 93-6—the electoral system in effect at the time the matter was pending before the court." App. 15a.

D. The District Court's Remedy Opinion

Having found liability, the District Court ordered the parties to propose remedies. The Board submitted Bill 93-6, and Respondents offered two plans, one a single-member district plan containing a majority-minority district and one an at-large plan eliminating residency districts and establishing a cumulative voting system. The District Court found that the Board had not expressed a preference between the two plans submitted by Respondents and ordered the cumulative voting system to be implemented. Despite recognizing the obligation to defer to the legislative judgments of the Board to the extent possible consistent with § 2, the District Court nonetheless ignored the Board's preference for a residency system that ensured that all Board members would be knowledgeable of and responsive to the diverse interests of the various regions of Worcester County. App. 37a-42a. The District Court entered its order and judgment mandating a cumulative voting system remedy on April 4, 1994.

E. The Fourth Circuit's Opinion

On September 16, 1994, the Fourth Circuit reversed on the issue of remedy because the District Court had not

given adequate deference to the Board's preference for residency districts. The panel remanded the case to the District Court with instructions to afford Petitioners an opportunity to submit a proposed remedial plan of their choosing. App. 15a.

With respect to the issue of liability, however, the panel affirmed the District Court, without discussing the District Court's limited description of the totality of circumstances. In a footnote, the panel discussed the District Court's conclusions regarding the compactness of Respondents' proposed majority-minority district. Specifically, the panel acknowledged the Supreme Court's holding in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), *on remand sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *appeal pending*, No. 94-923, United States Supreme Court, that race-conscious redistricting "constitutes impermissible race discrimination only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 10a n.6. The panel held, however, that Respondents' proposed district satisfied *Shaw*. The panel reasoned that:

1. the shape of Respondents' proposed district "is not geographically bizarre" but rather "is similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme";

2. the mere division of municipalities within the proposed majority-minority district did not constitute a failure to comply with traditional districting principles;

3. Respondents' proposed district "adhered to other traditional districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways"; and

4. the citizens within Respondents' proposed district "shared common socioeconomic and political concerns." App. 10a-11a n.6.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISIONS IN *SHAW* AND *GINGLES*, AS WELL AS WITH DECISIONS OF OTHER LOWER COURTS

The decisions of the District Court and the Fourth Circuit are in direct conflict with this Court's decisions in *Shaw* and *Gingles*, and are also in conflict with decisions of several three-judge courts interpreting *Shaw*, appeals from which are currently pending in this Court. These conflicts warrant the granting of this Petition.

A. The Decisions By The Courts Below Regarding Direct Evidence Of Racial Gerrymandering Conflict With This Court's Decision In *Shaw*

The District Court's decision relied on Respondents' evidence that it was possible to draw a geographically compact single-member district in Worcester County with a black majority by linking together black population concentrations in three non-contiguous municipalities. Respondents did not dispute, however, that to achieve this result they intentionally segregated voters by race. Indeed, Respondents excluded all considerations other than race in drawing this proposed district. Respondents' expert readily admitted as much in his trial testimony:

> Q Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed majority-minority district], would it be fair to say that what you have done is, you have linked together the black population concentrations in these three noncontiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> A [By Mr. Cooper] Well, obviously, that's what we've done.

App. 48a.

Notwithstanding this direct evidence of racial purpose, the District Court refused to acknowledge that this consciously segregated and racially designated proposed district violates *Shaw,* which prohibits the intentional use of race in drawing districts, without regard for traditional districting principles, unless the district is narrowly tailored to serve a compelling governmental interest. As this Court explained:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Shaw, 113 S. Ct. at 2827. This Court further made clear in *Shaw* that among the vices of intentionally segregating districts by race is that:

> elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. The *Shaw* Court also recognized that *even* when done for "remedial purposes," intentional racial gerrymandering

> may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

Id. at 2832.

What the District Court did here was precisely what *Shaw* prohibits. The District Court acknowledged the "dispersal" of the black population within the County, App. 22a, but nonetheless held the County liable based on a plan that "include[d] in one district individuals who belong[ed] to the same race, but who [were] otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." *Shaw*, 113 S. Ct. at 2827. In derogation of the County's longstanding policy of having each Board member represent all people in the County, Respondents' plan was "created solely to effectuate the perceived common interests of one racial group." *Id.* Such a plan poses the "particular danger[]" of "balkaniz-[ing] us into competing racial factions." *Id.* at 2832.

In short, because the courts below based their liability holdings on a plan that violates *Shaw*, this Court should review the decisions below.[3]

B. The Decisions By The Courts Below Regarding Bizarrely-Shaped Districts Conflict With This Court's Decision In *Shaw* And Its Progeny

Even apart from Respondents' admission that their proposed district intentionally segregated voters by race, its bizarre shape should have triggered strict scrutiny under *Shaw* and the cases following it. *Shaw* makes clear that the Equal Protection Clause is violated by a district that

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[3] The decisions below also contrast sharply with what the three-judge court did in *Hays v. Louisiana*, 839 F. Supp. 1188, 1199-1204 (W.D. La. 1993), *vacated and remanded*, 62 U.S.L.W. 3859, No. 93-5194, *further proceedings on remand*, C.A. No. 92-1522 (W.D. La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *appeal pending*, No. 94-627, United States Supreme Court, which held that such direct evidence of racial segregation as was presented here, by itself, demonstrated a constitutional violation. At the very least, the tension between the decisions here and the decision in *Hays* demonstrates that this Court's guidance on the proper interpretation of *Shaw* is necessary.

is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." 113 S. Ct. at 2824. Where a district is so shaped, a court "must determine whether [it] is narrowly tailored to further a compelling governmental interest." *Id.* at 2832. Applying these principles, three-judge courts have recently struck down bizarrely-shaped districts in Louisiana, Georgia, and Texas. *See Hays v. Louisiana, supra*, note 3; *Johnson v. Miller*, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994) (per curiam), *appeal pending*, Nos. 94-631 and 94-797, United States Supreme Court; *Vera v. Richards*, No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (S.D. Tex. Aug. 17, 1994), *stay granted*, 1994 U.S. Dist. LEXIS 12334 (1994), *appeal pending*, Nos. 94-805 and 94-806, United States Supreme Court.

Here, the result of Respondents' focus on race was an oddly-shaped district that snakes across Worcester County, stretching from its northern to its southern end, extracting the black citizens from numerous municipalities and communities in order to create a majority-minority district. The courts below nonetheless concluded that the district was geographically compact. The District Court reasoned that although Respondents' proposed districts "may not be symmetrical, . . . they are compact." App. 22a. The District Court further explained that Respondents' proposed district did not use " 'tentacle-like corridors,' " nor were its lines "so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering." App. 22a.

In fact, the proposed majority-minority district bears a striking resemblance to those invalidated in *Vera*, *Johnson*, and *Hays*.[4] At points, the district is only a few

[4] Maps of the districts at issue in *Vera*, *Johnson*, *Hays*, and *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994), as well as maps of Respondents' proposed district, are being lodged separately with this Court.

miles wide. Its bizarre shape is characterized by two prongs at its southern end that look more like a crocodile's mouth than a rational compact district. One look at the map of this proposed district reveals fingerlike extensions that had the purpose and effect of segregating Worcester County's white and African-American populations. Indeed, a comparison of the map of Respondents' proposed district with the maps of the districts struck down in *Hays, Vera,* and *Johnson* demonstrates that the lower courts are hopelessly in conflict over the proper role of district shape in cases decided under *Shaw*.

C. The Decisions By The Courts Below Conflict With This Court's Decision In *Gingles*

As noted above, *Gingles* held that one of the requirements for a § 2 claim is that minority plaintiffs must be sufficiently numerous and geographically compact to constitute a voting age population majority in a single-member district. 478 U.S. at 50. Although *Shaw* rests on the Fourteenth Amendment and not § 2, the compactness requirement of *Shaw* is essentially the same as that set forth in *Gingles*.[5] For the same reasons, therefore, that the proposed district violates *Shaw,* it violates *Gingles*. Indeed, in *Jeffers v. Tucker,* 847 F. Supp. 655 (E.D. Ark. 1994), the three-judge court, unlike the courts below in the present case, rejected a § 2 challenge and refused to require the drawing of non-compact districts. The court reasoned, "the peculiar shape of [the Plaintiffs' proposed] districts . . . is precisely due to the lack of the compact minority population required by *Gingles*." *Id.* at 662. This conflict likewise merits review by this Court.

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[5] *See Vera v. Richards,* 1994 U.S. Dist. LEXIS 12368 at *129 n.54.

D. The Justifications Proffered By The Courts Below For The Bizzare Shape Of Respondents' Proposed District Contravene The Requirements Of *Shaw* and *Voinovich v. Quilter*

As noted above, *Shaw* requires that a bizarrely-shaped district be narrowly tailored to serve a compelling governmental interest. 113 S. Ct. at 2832. Rather than evaluating the proposed district under the *Shaw* standard, the District Court rationalized its conclusion regarding the compactness of Respondents' proposed district by stating that its shape was "unavoidable because of the heavy white population and the need to achieve a majority African-American population in one of the districts." App. 22a. The District Court's reasoning was circular. It concluded that there was a "need" for a district with an African-American majority population. *Id.* That "need" was used to justify the holding of § 2 liability. The conclusion of liability in turn became the basis for holding that the Court needed to remedy the § 2 violation. This reasoning contravenes the express holding of this Court in *Voinovich v. Quilter,* 113 S. Ct. 1149, 1156 (1993), that "federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *See also Growe v. Emison,* 113 S. Ct. 1075, 1084 (1993) (unless *Gingles* preconditions are established, "there neither has been a wrong nor can be a remedy").

The Court of Appeals' rationale regarding compactness fares no better. The panel attempted to rationalize its conclusion regarding compactness by stating that Respondents' proposed district is "similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme." App. 11a n.6.[6] It

[6] The United States has used the quoted language in an effort to justify bizarrely-shaped districts in other cases. Jurisdictional Statement of the United States of America, in *United States of America v. Hays,* No. 94-558, filed September 26, 1994, at 13 ("[T]he manner in which the State has drawn . . . other districts is a proper

appears that the panel was comparing the proposed majority-minority district with District 4, which includes Assateague Island. The shape of District 4 is, of course, dictated by the boundaries of this island, which is a largely uninhabited barrier island that forms the eastern border of Worcester County. Thus, the boundaries of District 4, unlike those of Respondents' proposed district, are compelled by racially neutral, geographical considerations.

The panel likewise erred in characterizing the County's objection to the proposed plan as being based on its division of municipalities. App. 10a n.6. The division of municipalities was only one of several major departures from traditional districting principles evident from the proposed majority-minority district. It also bisected five election districts and divided established communities of interest predicated upon socioeconomic, recreational, regional, educational, historical, and political characteristics unrelated to race. App. 52a-57a.[7]

Nor, contrary to the panel's opinion, did Respondents' proposed district "adhere[] to other traditional districting principles such as the historical north-south division of the County." App. 10a-11a n.6. Again, a glance at the

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benchmark for determining whether a particular majority-minority district is 'bizarre.' A bizarre district is one that reflects an extraordinary departure from a State's usual districting practices. See *Cane v. Worcester County, Maryland*, No. 94-1579 (4th Cir. Sept. 16, 1994) . . . .").

[7] In holding that the division of municipalities in Respondents' proposed district complied with *Shaw*, the panel erroneously relied on *Clark v. Calhoun County, Mississippi*, 21 F.3d 92, 96 (5th Cir. 1994), because it thought that the Fifth Circuit had held there that a proposed majority-minority district that divided municipalities nonetheless complied with traditional districting principles. The Fifth Circuit, however, did not reach such a conclusion. Instead, it simply remanded a district court's holding that a majority-minority district was not compact under *Gingles* because the district court had not made adequate factual findings to support its conclusion. *Id.* at 96-97.

map demonstrates that, far from respecting the County's traditional north-south division, Respondents' proposed district disregards it, stringing together communities from the northeastern to the southwestern regions of the County.

E. The Decisions Of The Courts Below Conflict With Those Of Other Courts Regarding The Propriety Of Racially Defined "Communities Of Interest"

The panel erred as a matter of law when it stated that "uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns." App. 11a n.6. On the contrary, the only characteristics that defined a community of interest within Respondents' proposed district were grounded in race (*see* Brief of Appellees, No. 94-1579, at 14). Indeed, the District Court admitted that "[t]he plan merely affirms the existing racial divisions in the County." App. 22a. As this Court has recognized, however, such a racially defined district "bears an uncomfortable resemblance to political apartheid." *Shaw,* 113 S. Ct. at 2827.[8] *See also Burton v. Sheheen,* 793 F. Supp. 1329, 1357 (D.S.C. 1992) ("the color of one's skin, in and of itself, does not create a community of interest"), *vacated on other grounds sub nom. Statewide Reapportionment Advisory Comm. v. Theodore,* 113 S. Ct. 2954 (1993). Other three-judge courts have similarly concluded that race cannot constitute a community of interest in and of itself. *See Johnson v. Miller,* 1994 U.S. Dist. LEXIS 13043 at *61-*62:

> The problem with this tack is that, while partially convincing, such a community of interest is barred

[8] As Justice Douglas observed, such racial line drawing causes "the multiracial . . . communities that our Constitution seeks to weld together as one [to] become separatist." *Wright v. Rockefeller,* 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

> from constitutional recognition. To urge this racial identification as a justification for the shape of the Eleventh District is tantamount to simply admitting that race was the overriding consideration in its creation. . . . A voting district . . . that is configured to cater to these "black" concerns is simply a race-based voting district. It is based on superficial, racially founded generalizations about what matters to black Georgians. That is, it trafficks in racial stereotypes.

Likewise, in *Vera v. Richards,* 1994 U.S. Dist. LEXIS 12368 at *113, the three-judge court rejected the argument that:

> there is a community of interest among African-American voters which should be regarded as a legitimate criterion for legislative districting. Even if this argument would support the decision of the Legislature to take African-American voters' group interests into account in the same way that it does the interest of other voters, e.g., suburbanites, city-dwellers, retirees, the argument cannot go too far. Because a large part of this argument is based upon similarities grounded in race, it is particularly vulnerable to the Fourteenth Amendment's proscription of racial classification in our society. Further, the intervenors' argument will not support the creation of districts that have no basis in traditional neutral districting criteria. To permit such districts would fly in the face of *Shaw*.

Here, as in *Johnson v. Miller* and *Vera v. Richards*, Respondents asked the court to approve district boundaries that were based on a racial community of interest. Unlike the courts in *Johnson* and *Vera*, however, the courts below concluded that such a community of interest could justify a geographically non-compact majority-minority district. In so holding, the courts below erred as a matter of law. This conflict between the lower courts' opinions here and the opinions in *Johnson*, *Vera*, and,

most important, *Shaw* regarding the issue of whether a community of interest can be based on race likewise warrants review by this Court.

II. THE DECISIONS BELOW PRESENT AN ISSUE OF OVERRIDING NATIONAL IMPORTANCE

The courts below felt compelled to hold the first *Gingles* precondition was satisfied by a non-compact, racially defined district. As shown above, this decision conflicts with *Shaw*, and it highlights the need for this Court's guidance on how to apply *Gingles* consistently with *Shaw*. The courts increasingly are faced with what some view as a currently irreconcilable tension between *Gingles*, which some have interpreted as mandating the intentional creation of majority-minority districts, and *Shaw*, which prohibits the intentional segregation of voters into such districts based on their race, absent a compelling governmental interest and narrow tailoring. As the State of Georgia, *et al.* noted in *Miller v. Johnson*, United States Supreme Court No. 94-631:

> [W]e are moving close to a legal environment where, on the one hand, the Voting Rights Act imposes certain mandates, *Thornburg v. Gingles*, 478 U.S. 30 (1986), but the Fourteenth Amendment prohibits the State from going too far in that direction. *Shaw v. Reno, supra.*[9]

All of the cases discussed above demonstrate that the issue posed by the decisions below is presently in litigation in all parts of this country, from the west coast to the deep south to the Atlantic states. These cases demonstrate not only the importance of this issue but the frequency with which it arises in the federal courts. The courts are clearly divided on the meaning and application of *Gingles*' "geographical compactness" requirement, and the extent to which race-based districts can depart from traditional districting principles.

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[9] Jurisdictional Statement of State of Georgia, *et al.*, at 15.

In particular, the lower courts' decisions demonstrate that the proper application of *Shaw* has become an issue not simply in congressional redistricting, but also in state and local government redistricting. In addition to the federal government and the fifty state governments, there were 84,955 units of local government as of January 1992. Of these, 3,043 were county governments and 19,279 were municipal governments. The remainder consisted of 16,656 town or township governments, 14,422 school district governments, and 31,555 special district governments and other special purpose local government districts. U.S. Bureau of the Census, *1992 Census of Governments*, Vol. 1, Government Organization, No. 1 (March 1994), at v.[10] Given these numbers, the issues presented by these conflicting lower court decisions will clearly continue to arise repeatedly unless the Court provides guidance now.

III. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *DEGRANDY* AND THE FIFTH CIRCUIT'S DECISION IN *WESTWEGO*

The decisions of the District Court and the Court of Appeals are in direct conflict with this Court's decision in *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994), in which this Court held that mere establishment of the *Gingles* preconditions will not suffice to prove a § 2 vote dilution claim, and that a district court is required to rest its ultimate conclusions about equality or inequality of opportunity upon "comprehensive, not limited, canvassing of relevant facts." *Id.* at 2657. The courts below did not adequately consider the "totality of circumstances," as required by the words of § 2 itself, 42 U.S.C. § 1973(b), and failed to make the necessary findings of fact regarding them.

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[10] *See* Justice Clarence Thomas' concurring opinion in *Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994), noting that over 60% of American cities use at-large election systems for their governing bodies.

These circumstances include the factors identified in the legislative history of § 2, such as discriminatory slating of candidates, racial campaign appeals, and lingering socioeconomic disparities between minorities and others. *Gingles*, 478 U.S. at 50-53. While lack of electoral success is also a factor that may be evidence of vote dilution, "courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Johnson v. DeGrandy*, 114 S. Ct. at 2657.[11]

In *DeGrandy*, the District Court found that the three *Gingles* preconditions were satisfied and that the minorities in that case had suffered historically from official discrimination and continued to feel the social, economic, and political effects of such discrimination, but the Supreme Court made it clear that more was required. The District Court was required to examine other evidence in the "totality of circumstances," including the extent of the opportunities minority voters enjoyed to participate in the political process, and its conclusion regarding the lack of equal electoral opportunity was required to be "addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment." 114 S. Ct. at 2657.

The District Court in the instant case concluded, just as the District Court did in *DeGrandy*, that once the

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[11] *See also Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (§ 2 requires minority claimants to prove that they "have less opportunity than others 'to participate in the political process *and* to elect representatives of their choice' ") (quoting 42 U.S.C. § 1973); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 312 (3d Cir. 1994) (plaintiffs must show causal connection between challenged practice and prohibited result); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 867-68 (5th Cir. 1993) (plaintiffs must establish that "past discrimination has affected their ability to participate in the political process"), *cert. denied*, 114 S. Ct. 878 (1994).

Gingles preconditions were in its view established, little more than a cursory recitation of past discrimination, which included in this case a history of segregated school systems and the historical legacy of slavery, without elaboration as to the current effect or present impact of the totality of the circumstances on equal opportunity and access, was required in order to justify the conclusion of vote dilution under § 2. As the Court made clear in *DeGrandy*, more was required.

The Court of Appeals' conclusions regarding the adequacy of the District Court's findings are particularly serious errors under *DeGrandy*, in light of the fact that the Court of Appeals used the District Court's inadequate findings to invalidate not simply the existing electoral system, but also the Bill 93-6 system, which the District Court had not considered at all. *See* App. 15a ("[T]he district court failed to rule on the legality of the scheme set forth in Bill 93-6.").

Consistent with *DeGrandy*, *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1203-04 (5th Cir. 1989), *rev'd after remand*, 906 F.2d 1042 (5th Cir. 1990), *rev'd and remanded*, 946 F.2d 1109 (5th Cir. 1991), which similarly involved a challenge to an at-large electoral system, requires a district court's findings in a § 2 vote dilution suit to be sufficiently specific and particularized to provide a basis for the judgment and for meaningful appellate review of the decision. *Westwego* requires a district court to take note of substantial contrary evidence, to specify on which evidence it relies in support of its conclusions, and to explain its reasoning with sufficient particularity. Here, the District Court failed to make specific and sufficiently particularized findings as to the totality of the circumstances and failed to undertake a searching practical evaluation of the past and present reality and political landscape of Worcester County, as required by *Westwego*. *See also Clark v. Calhoun County, Mississippi*, 21 F.3d 92 (5th Cir. 1994), holding that inadequate and insufficient particularized

findings of the District Court rendered its conclusion as to § 2 liability erroneous as a matter of law.

The Court should grant certiorari to provide guidance on the crucial aspect of voting rights law presented in this case.

CONCLUSION

For these reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the decision of the Court of Appeals in this case. Failing that, the Court should withhold its disposition of this Petition pending the Court's decisions in *Hays v. Louisiana, Johnson v. Miller*, and *Vera v. Richards*, which will likely shed light on further proceedings in this case.

Respectfully submitted,

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